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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

J THOMPSON, et al., Individually and on
Behalf of All Others Similarly Situated,

Plaintiffs,

v.

1-800 CONTACTS, INC., et al.,

Defendants.

**DEFENDANTS' MOTION TO
COMPEL PRODUCTION OF
DOCUMENTS IN RESPONSE TO
REQUEST NO. 47**

ORAL ARGUMENT REQUESTED

Case No.: 2:16-cv-01183-TC

Judge Tena Campbell
Magistrate Judge Dustin B. Pead

Defendants move the Court, pursuant to DUCivR 37-1, to compel Plaintiffs to produce information about Named Plaintiffs’ “use or purchase of eyeglasses.”

Through Request 47, Defendants seek this information about eyeglasses to assess Named Plaintiffs’ adequacy as class representatives and to evaluate the relevant market in this action.¹ Plaintiffs’ only objection is that the requested information is irrelevant.²

The first step in a rule of reason analysis under Section 1 of the Sherman Act is determining whether a competitor possesses market power, which necessarily involves identification of the relevant market. *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 965-966 (10th Cir. 1994) (citing *P. Areeda & H. Hovenkamp*, Antitrust Law ¶ 518.1c, at 535 (Supp.1993)). “A plaintiff cannot arbitrarily choose the product market relevant to its claims; instead, the plaintiff must justify any proposed market by defining it with reference to the rule of reasonable interchangeability and cross-elasticity of demand.” *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, 846 F.3d 1297, 1313 (10th Cir. 2017). Identification of the appropriate market is necessary to determine “whether the alleged anticompetitive activity restrained trade, that is, raised price or reduced output.” *SCFC*, 36 F.3d at 966.

Plaintiffs claim that the relevant product market in this matter is “the market for online sales of contact lenses.” Am. Compl. ¶ 36. Defendants seek discovery that goes to the core of this allegation, including whether Named Plaintiffs themselves view eyeglasses as substitutes for contact lenses. In fact, Plaintiff Thompson’s original complaint in this action alleged that

¹ See Ex. 1; Ex. 4; Ex. 5.

² See Ex. 2; Ex. 3.

eyeglasses “provide[] some of the same benefits as contact lenses”. ECF 1, at 9-10.³

Second, these documents are relevant to assess the appropriateness of this case proceeding as a class action. Named Plaintiffs’ use and purchase of eyeglasses may bear upon the typicality and adequacy of class representatives. For example, if a Named Plaintiff switched to eyeglasses from contact lenses, either permanently or periodically, he or she may have divergent interests from class members who continuously wear contacts. Frequent eyeglass-wearers’ online shopping habits may differ fundamentally from those who rely only on contacts. So too, these individuals may be exposed to a different volume and set of paid online advertisements, including those at issue in this litigation.

Documents relating to Named Plaintiffs’ purchase and use of eyeglasses directly pertain to the relevant market analysis and putative class claims. Accordingly, Defendants request that Plaintiffs’ objections be overruled, and that Plaintiffs be compelled to produce the requested documents.

Dated: June 21, 2019

By: /s/ Brent O. Hatch

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³ Indeed, this court has acknowledged that determination of the relevant product market is a fact-intensive inquiry. Defendants seek additional facts to inform this analysis. *Thompson v. 1-800 Contacts, Inc.*, No. 2:16-CV-1183-TC, 2018 WL 2271024, at *5 (D. Utah May 17, 2018).

Dated: June 21, 2019

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RULE 37 CERTIFICATION

Counsels for Defendants hereby certify that they have attempted, in good faith, to resolve this dispute without Court assistance, including through repeated correspondence and telephone conferences with Class Counsel.

Specifically, all Defendants and Plaintiffs participated in two telephonic meet-and-confer calls on November 7, 2018 at 11:00 a.m. MDT and December 19, 2018 at 12:00 p.m. MDT, but were unable to resolve their differences regarding the relevance of the requested information.

Dated: June 21, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June 2019, I caused the foregoing Motion to Compel to be served on counsel of record via electronic filing.

By: /s/ Brent O. Hatch

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